

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

SHOLANDA MCGILL,

Plaintiff,

vs.

ROBERT A. MCDONALD, Secretary of  
Veterans Affairs,

Defendant.

2:14-cv-00137-RCJ-VCF

**ORDER**

This case arises from the Department of Veterans Affairs's ("the VA") alleged violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), as well as various state tort laws. Pending before the Court is a Motion for Summary Judgment (ECF No. 43) filed by Defendant Robert A. McDonald, Secretary of Veterans Affairs. For the reasons contained herein, the motion is granted.

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff Sholanda McGill is a homosexual African-American woman who began employment with the VA on November 22, 2008. (Am. Compl. ¶¶ 12–13, ECF No. 28). Plaintiff has been diagnosed with fibromyalgia, IBS, PTSD, anxiety, and depression. (*Id.* ¶ 20; Pl.'s Dep., 14, ECF No. 43-2). She worked as a respiratory therapist at the VA's hospital in Clark County, Nevada. (Am. Compl. ¶¶ 11, 14). In 2010, Plaintiff filed a complaint with the union, and she filed an Equal Employment Opportunity ("EEO") complaint with the VA

1 claiming that two male coworkers were subjecting her to severe physical and verbal harassment  
2 based on her sexual orientation. (*Id.* ¶¶ 18–19). Because of the harassment, she suffered from  
3 depression, nausea, headaches, stress, fatigue, and nightmares. (*Id.* ¶ 20; Pl.’s Dep., 14–15). The  
4 VA opened an investigation into Plaintiff’s claims and temporarily moved Plaintiff to an  
5 outpatient facility away from the coworkers who were harassing her. (*Id.* at 8; Am. Compl. ¶ 25).  
6 In her new position, Plaintiff worked as a respiratory therapist training veterans how to use  
7 respiratory equipment, such as continuous positive airway pressure (“CPAP”) equipment. (Pl.’s  
8 Dep., 11–12). Plaintiff had received training to work in inpatient care, which her prior position at  
9 the hospital involved, but she was not trained to work in outpatient care. (*Id.*). Once the VA’s  
10 investigation was complete, Plaintiff’s temporary position became permanent along with a lower  
11 pay grade. (*Id.* ¶¶ 22–23).

12 In July 2012, Plaintiff received an email informing her that she was required to attend a  
13 walk-through of a new VA facility where the outpatient respiratory therapists would be  
14 relocated. (*Id.* ¶ 26; Pl.’s Dep., 16–18). Plaintiff alleges that Defendant informed her that the  
15 harassers “would be transferring to [the] new hospital facility in the pulmonary department; the  
16 same department of the Plaintiff.” (Admis. No. 6, ECF No. 43-4, at 4). Plaintiff informed her  
17 supervisors and the VA’s local human resources office about her fear that the move would return  
18 her to a hostile working environment. (Am. Compl. ¶ 28). Plaintiff alleges that Defendant failed  
19 to address her concerns and instead demanded that she report to work at the new facility or be  
20 reported AWOL. (*Id.* ¶ 29; E-mail, 111, ECF No. 44). Despite three separate attempts to report to  
21 the new facility, Plaintiff could not overcome the “physical[] and mental[] afflict[ion]” that she  
22 experienced at the thought of working in the same building with her former harassers. (Am.  
23 Compl. ¶¶ 30–31). This distress allegedly caused her existing conditions to worsen. (*Id.* ¶ 35).

1 Plaintiff filed another EEO and union complaint and proposed that Defendant create an  
2 “Education CPAP Clinic” in one of its primary care clinics that would allow Plaintiff to continue  
3 her outpatient duties at the same pay rate and at a facility apart from the other respiratory  
4 therapists. (*See* Proposal, 54, ECF No. 43-2; Pl.’s Decl., ¶ 20, ECF No. 44, at 108). The parties  
5 failed to reach a mutually agreeable solution, and on December 13, 2012, Plaintiff resigned.  
6 (Am. Compl. ¶¶ 41–42; Pl.’s Dep., 45). Plaintiff believes that Defendant subjected her to  
7 disparate treatment due to her sex, sexual orientation, disability, and EEO complaints. (Am.  
8 Compl. ¶ 43).

9 Plaintiff’s Complaint contained ten causes of action. She voluntarily withdrew three of  
10 them, (Resp. 16, ECF No. 20), and the Court dismissed four others with prejudice and one with  
11 leave to amend, (*see* Order, ECF No. 25). Plaintiff filed an Amended Complaint and Defendant  
12 answered. (*See* ECF Nos. 28, 32). Defendant now moves for summary judgment on the three  
13 remaining claims: (1) disability discrimination; (2) retaliation; and (3) constructive discharge.

## 14 **II. LEGAL STANDARDS**

15 A court must grant summary judgment when “the movant shows that there is no genuine  
16 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.  
17 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v.*  
18 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there  
19 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A  
20 principal purpose of summary judgment is “to isolate and dispose of factually unsupported  
21 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

22 In determining summary judgment, a court uses a burden-shifting scheme. The moving  
23 party must first satisfy its initial burden. “When the party moving for summary judgment would  
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1 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a  
2 directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v.*  
3 *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation and internal quotation marks  
4 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or  
5 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate  
6 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
7 party failed to make a showing sufficient to establish an element essential to that party’s case on  
8 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24.

9       If the moving party fails to meet its initial burden, summary judgment must be denied and  
10 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,  
11 398 U.S. 144 (1970). If the moving party meets its initial burden, the burden then shifts to the  
12 opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v.*  
13 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
14 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
15 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’  
16 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809  
17 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary  
18 judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*,  
19 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and  
20 allegations of the pleadings and set forth specific facts by producing competent evidence that  
21 shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

22       At the summary judgment stage, a court’s function is not to weigh the evidence and  
23 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477  
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U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50. Notably, facts are only viewed in the light most favorable to the non-moving party where there is a genuine dispute about those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, even where the underlying claim contains a reasonableness test, where a party’s evidence is so clearly contradicted by the record as a whole that no reasonable jury could believe it, “a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

### III. ANALYSIS

#### A. Disability Discrimination

##### 1. Legal Standards

The Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, prohibits discrimination against any “otherwise qualified individual with a disability.” § 794(a); *see also* § 794a(a)(1) (providing a cause of action for employment discrimination). The standards used under the Americans with Disabilities Act (“ADA”) apply to a claim of employment discrimination under the Rehabilitation Act. § 791(f). To evaluate an employment discrimination claim, the courts use the *McDonnell Douglas* burden-shifting framework. *See Mustafa v. Clark Co. Sch. Dist.*, 157 F.3d 1169, 1174–77 (9th Cir. 1998); *see also Raytheon Co. v. Hernandez*, 540 U.S. 44, 49–52 (2003) (applying the *McDonnell Douglas* standard to an ADA claim on summary judgment). Under this framework,

the plaintiff must establish a prima facie case of discrimination. If the plaintiff succeeds in doing so, then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory conduct. If the defendant provides such a reason, the burden shifts back to the plaintiff to show that the employer’s reason is a pretext for discrimination.

*Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003).

1 To establish a prima facie case of failure to accommodate, Plaintiff must show that ““(1)  
2 she is disabled within the meaning of the ADA; (2) she is a qualified individual able to perform  
3 the essential functions of the job with reasonable accommodation; and (3) she suffered an  
4 adverse employment action because of her disability.”” *Samper v. Providence St. Vincent Med.*  
5 *Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (quoting *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th  
6 Cir. 2003) (alterations omitted)).

7 2. Analysis

8 The parties do not dispute that Plaintiff is disabled within the meaning of the ADA;  
9 instead, Defendant argues that Plaintiff cannot establish a prima facie case based on factors two  
10 and three.

11 i. Qualified Individual

12 Defendant argues that Plaintiff is not a qualified individual because her request for  
13 accommodation is not reasonable, and even if Defendant attempted to make the requested  
14 accommodation Plaintiff would not be able to perform the essential functions of the job. To  
15 determine whether an individual is qualified, “[t]he court first examines whether the individual  
16 satisfies the requisite skill, experience, education and other job-related requirements of the  
17 position. The court then considers whether the individual can perform the essential functions . . .  
18 with or without a reasonable accommodation.” *Samper*, 675 F.3d at 1237 (quoting *Bates v.*  
19 *United Parcel Svc., Inc.*, 511 F.3d 974, 990 (9th Cir. 2007) (en banc)). The employer has the  
20 burden of establishing what job functions are essential. *Id.*

21 Defendant has adduced evidence establishing that the essential functions of Plaintiff’s job  
22 include, inter alia, the following:

- 23 • Performing routine maintenance of respiratory therapy equipment;

- Operating all pulmonary function testing and arterial blood gas equipment for use at the HASNHS, Ambulatory Care Center, and Pulmonary Clinic;
- Performing initial setup of CPAP and bi-level positive airway pressure (BiPAP) equipment, and reviewing the use, functions, upkeep and maintenance of the equipment with veterans;
- Doing timely entry of issued equipment;
- Working closely with the Prosthetics Department related to CPAP/BiPAP equipment.

(See Decl. Tareq Jamil ¶ 9, ECF No. 43-6, at 3; Doc., 8, ECF No. 43-6). Plaintiff does not dispute that these functions are the essential functions of her position.

Defendant does not dispute that Plaintiff possesses the requisite skill, experience, education and other requirements of the position. Instead, Defendant argues that no accommodation is reasonable or would allow Plaintiff to perform the essential functions of the position. The employee bears the burden of producing evidence to show that a reasonable accommodation is possible. *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002). If she does, then the employer must produce rebuttal evidence to show that the requested accommodation is not reasonable. *Id.*

Plaintiff's requested accommodation was that Defendant create an "Education CPAP Clinic" in one of its primary care clinics that would allow Plaintiff to continue her outpatient duties at the same pay rate and at a facility apart from the other respiratory therapists. (See Proposal, 54, ECF No. 43-2; Pl.'s Decl., ¶ 20, ECF No. 44, at 108; Pl's. Dep., 20–21, 30). Plaintiff has presented no evidence to show that her requested accommodation was possible. Instead, she presents evidence that Defendant told her that her "proposed clinic does not align well with [the] mission of providing the best care in pulmonary medicine to our nation's veterans." (E-mail, 111, ECF No. 44). Plaintiff presents no evidence that Defendant could have offered her a respiratory therapist position at an existing outpatient clinic. She presents the

1 testimony of Gregory Orlando Wolff, a human resources officer, who said that it is *possible* that  
2 respiratory therapists could be working at clinics outside the hospital, (Dep. Wolff, 71:1-8, ECF  
3 No. 44, at 102), but Wolff's testimony does not assert either way whether respiratory therapists  
4 work at the outside clinics.

5 Defendant presents evidence to show that it had no ability to offer Plaintiff an outpatient  
6 respiratory therapist position. Milan S. Parekh, Deputy Chief of Staff of Medicine at VASNHS,  
7 testified that all the employees of the Outpatient Pulmonary Clinic moved to the new facility and  
8 that "no certified respiratory therapists remained in outpatient clinics outside of the new medical  
9 center." (Decl. Parekh, ¶¶ 12, 16, ECF No. 43-1; *see also* Pl's. Dep., 16-18). Plaintiff also states  
10 that she is not aware of any openings for respiratory therapists at other clinics, and she does not  
11 know whether respiratory therapists worked at the other clinics. (Pl's. Dep., 21-22, 44).

12 Tareq Jamil, Chief of the Pulmonary Section at VASNHS, also testifies that Plaintiff's  
13 proposal "would not work outside of the pulmonary clinic because such a position cannot be  
14 done remotely." (Decl. Tareq Jamil, ¶ 10, ECF No. 43-6). Specifically, a respiratory therapist  
15 must have access to the pulmonary clinic where large equipment and necessary supplies are  
16 housed, and a therapist's work in training veterans to use CPAP equipment must be done with  
17 physician oversight. (*Id.*). In other words, "[Plaintiff's] position as a certified respiratory  
18 therapist depends on being part of the pulmonary clinic, which was moving to the new medical  
19 center." (*Id.* ¶ 8). Thus, it was not possible for Defendant to allow Plaintiff to work as a  
20 respiratory therapist outside the new facility because all the respiratory therapists and the  
21 necessary equipment and resources would be at the new facility. *See Samper*, 675 F.3d at 1237  
22 (finding that one who is not able to be at work cannot be a "qualified individual" for jobs  
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1 requiring an employee to be on site, such as jobs that “require the employee to work with items  
2 and equipment that are on site”).

3 Furthermore, “the ADA does not impose a duty to create a new position to accommodate  
4 a disabled employee.” *Wellington v. Lyon Cty. Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir. 1999). It  
5 would be unreasonable and create an undue hardship to require Defendant to create a new position  
6 to accommodate Plaintiff’s disability, and especially an entire new clinic as she has requested.  
7 Defendant proposed that Plaintiff fill a different position with different duties outside the new  
8 facility, but she rejected the proposal because it was “a G5 demotion to a clerical position.” (Pl.’s  
9 Decl. ¶ 18, ECF No. 44, at 108). Plaintiff’s requested accommodation is not reasonable because  
10 it is not possible. Thus, she is not a “qualified individual” within the meaning of the ADA.  
11 Plaintiff has not shown that any genuine issue of material fact exists as to this conclusion.

12 Plaintiff argues that Defendant failed to engage in an “interactive process” to consider her  
13 requested accommodation. If an employee is disabled, the employer has “a duty to engage in an  
14 interactive process . . . ‘to clarify what the individual needs and identify the appropriate  
15 accommodation.’” *Vinson*, 288 F.3d at 1154–55 (quoting *Barnett v. U.S. Air, Inc.*, 228 F.3d  
16 1105, 1112 (9th Cir. 2000)). “An employer who fails to engage in such an interactive process in  
17 good faith may incur liability ‘if a reasonable accommodation would have been possible.’” *Id.*  
18 (quoting *Barnett*, 228 F.3d at 1116).

19 The evidence shows that representatives for Defendant met with Plaintiff on August 9,  
20 2012 to discuss her proposal to create a new outpatient clinic and her concerns regarding the new  
21 facility. (*See* Decl. Parekh ¶ 11; Pl.’s Dep., 31). This meeting is evidence that an “interactive  
22 process” addressing Plaintiff’s concerns occurred, and even if it did not occur, Defendant has  
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1 established that the reasonable accommodation Plaintiff requested was not possible; thus,  
2 Defendant cannot be liable for failing to satisfy this requirement.

3 Plaintiff has failed to establish a prima facie case of failure to accommodate. The Court  
4 grants the motion for summary judgment as to this claim in Defendant's favor.

5 **B. Retaliation**

6 1. Legal Standards

7 The Civil Rights Act prohibits employers from discriminating against an employee for  
8 invoking her rights under federal discrimination laws. 42 U.S.C. § 2000e-3. To establish a prima  
9 facie case of retaliation, a plaintiff "must establish that [1] he undertook a protected activity  
10 under Title VII, [2] his employer subjected him to an adverse employment action, and [3] there is  
11 a causal link between those two events." *Vasquez*, 349 F.3d at 646.

12 2. Analysis

13 Defendant concedes that Plaintiff undertook a protected activity by filing EEO  
14 complaints, but Defendant argues that Plaintiff cannot establish the second and third elements of  
15 a prima facie case.

16 Plaintiff alleges that Defendant retaliated against her by forcing her to return to a hostile  
17 work environment, denying her requested accommodation, and constructively discharging her.  
18 An action is an adverse employment action "if it is reasonably likely to deter employees from  
19 engaging in protected activity." *Id.* at 646. Defendant presents evidence to show that all the  
20 employees at the outpatient clinic moved to the new facility and that no respiratory therapists  
21 remained in outpatient clinics. (Decl. Parekh, ¶¶ 12, 16, ECF No. 43-1; *see also* Pl's. Dep., 16–  
22 18). Plaintiff has presented no evidence to show that Defendant treated her differently than other  
23 employees in regard to the move. Requiring an employee to move like all other employees in a  
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1 clinic would not reasonably deter an employee from filing a complaint of discrimination. Also,  
2 denying Plaintiff the accommodation she requested is not an adverse action for purposes of  
3 retaliation because Defendant has established that the accommodation was not reasonable.  
4 Finally, Plaintiff argues that her constructive discharge is evidence of retaliation because it  
5 occurred after her complaints, but she presents no facts to support her argument.

6 Even if any of Defendant's actions did constitute adverse employment actions, Plaintiff  
7 has presented no facts to dispute Defendant's argument that there is no causal link between  
8 Plaintiff's protected activity and any of Defendant's actions. She has presented no evidence of  
9 any retaliatory motive, or even a possible inference of a retaliatory motive.

10 Plaintiff has failed to establish a prima facie case of retaliation. The Court grants the  
11 motion for summary judgment as to this claim in Defendant's favor.

### 12 **C. Constructive Discharge**

#### 13 **1. Legal Standards**

14 [C]onstructive discharge occurs when the working conditions deteriorate, as a  
15 result of discrimination, to the point that they become sufficiently extraordinary  
16 and egregious to overcome the normal motivation of a competent, diligent, and  
reasonable employee to remain on the job to earn a livelihood and to serve his or  
her employer.

17 *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) (quoting *Brooks v. City of San Mateo*,  
18 229 F.3d 917, 930 (9th Cir. 2000)). "Whether working conditions were so intolerable and  
19 discriminatory as to justify a reasonable employee's decision to resign is normally a factual  
20 question for the jury." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996).  
21 Summary judgment is appropriate "where the 'decision to resign was unreasonable as a matter of  
22 law.'" *Lawson v. Washington*, 296 F.3d 799, 805 (9th Cir. 2002) (quoting *King v. AC & R*  
23 *Advertising*, 65 F.3d 764, 767 (9th Cir. 1995) (alteration omitted)). To prevail on a claim of  
24 constructive discharge, a plaintiff "must show some aggravating factors, such as a continuous

1 pattern of discriminatory treatment.” *Wallace v. City of San Diego*, 479 F.3d 616, 626 (9th Cir.  
2 2007) (quoting *Schnidrig*, 80 F.3d at 1412).

## 3 2. Analysis

4 Defendant argues that Plaintiff cannot show that any discriminatory conditions existed at  
5 the time of her resignation. Defendant points the Court to *Wallace* which recognizes “the  
6 requirement that the intolerable conditions exist at the time of the employee’s resignation.” 479  
7 F.3d at 627; *see also Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994) (“in  
8 order to constitute constructive discharge, harassment must be intolerable *at the time of the*  
9 *employee’s resignation*”) (emphasis in original) (internal quotations omitted). The evidence  
10 shows that Plaintiff’s harassers were not harassing her at the time of her resignation because she  
11 was working away from them in the outpatient clinic. (Pl.’s. Dep., 40–41). Also, the harassers did  
12 not work at the new facility prior to Plaintiff’s resignation. (Decl. Parekh, ¶ 18). However, in  
13 *Wallace* the Ninth Circuit found that a jury could have found that constructive discharge  
14 occurred when the plaintiff’s working conditions had incrementally improved, but the “employer  
15 was still willing and able to take continued discriminatory action against [the plaintiff].”<sup>1</sup> 479  
16 F.3d at 627.

17 Here, no evidence shows that Defendant discriminated against Plaintiff or that Defendant  
18 was willing and able to begin discriminating against her. According to Plaintiff, Defendant  
19 informed her that the harassers “would be transferring to [the] new hospital facility in the

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20 <sup>1</sup> Specifically, the Ninth Circuit found that the jury could have determined that the employer  
21 condoned the discriminatory behavior by not taking disciplinary action against the  
22 discriminators, *id.*, and the plaintiff’s manager had “threatened [the plaintiff] with termination  
23 for *any future misconduct*,” *id.* at 629 (emphasis in original). The evidence “permitted a  
24 reasonable jury to conclude that [the plaintiff’s] employment conditions had not sufficiently  
changed to preclude a constructive discharge claim.” *Id.* at 627–28. Further, “the jury could have  
concluded that [the plaintiff] reasonably feared subsequent transfer to a less desirable post” or to  
the same division where the discrimination occurred. *Id.* at 628.

1 pulmonary department; the same department of the Plaintiff.” (Admis. No. 6, ECF No. 43-4, at  
2 4). Thus, if she had begun working at the new facility, then she might have faced an immediate  
3 threat of renewed harassment, which could have created intolerable working conditions.  
4 However, *Wallace* and the standards for a claim of constructive discharge require the existence  
5 of discrimination, not just difficult working conditions.

6 As described above, Plaintiff has failed to present any evidence that Defendant  
7 discriminated against her based on her disability or that Defendant retaliated against her.  
8 Although Plaintiff presents evidence of harassment by her co-workers, she presents no evidence  
9 that the allegedly intolerable conditions created by the harassment were the “result of  
10 discrimination” by Defendant, her employer. *Poland*, 494 F.3d at 1184. And even if Defendant  
11 did discriminate against Plaintiff in some way, she has not shown that ““a continuous pattern of  
12 discriminatory treatment”” or other aggravating factors related to discrimination existed.  
13 *Wallace*, 479 F.3d at 626 (quoting *Schnidrig*, 80 F.3d at 1412). Although Plaintiff alleges that  
14 Defendant failed to adequately address the harassment against her, she has presented no evidence  
15 of discriminatory motive or intent in Defendant’s actions in the discipline of the harassers or in  
16 moving Plaintiff to the outpatient facility. Plaintiff certainly faced a difficult choice of either  
17 accepting a clerical position with a two-step demotion, (*see* Pl.’s Decl. ¶ 18), or working at the  
18 new facility where her former harassers might also be working, but these working conditions  
19 were not “so intolerable *and* discriminatory as to justify a reasonable employee’s decision to  
20 resign.” *Schnidrig*, 80 F.3d at 1411 (emphasis added).

21 Because Plaintiff has failed to present any evidence of discrimination by Defendant, her  
22 decision to resign in the context of a constructive discharge claim ““was unreasonable as a matter  
23 of law,”” *Lawson*, 296 F.3d at 805 (quoting *King*, 65 F.3d at 767), and, thus, summary judgment  
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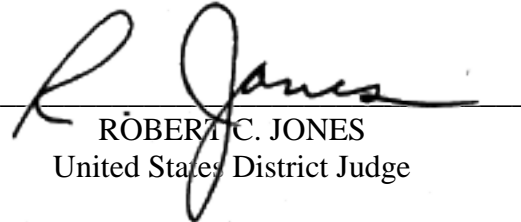
1 is appropriate. Defendant has shown that Plaintiff cannot meet her burden to prove a claim of  
2 constructive discharge. The Court grants the motion for summary judgment as to this claim.

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that the Motion for Summary Judgment (ECF No. 43) is  
5 GRANTED.

6 IT IS SO ORDERED.

7 Dated this 22nd day of February, 2017.

8   
9 ROBERT C. JONES  
United States District Judge